IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

STATE OF ARIZONA,	)	No. 2 CA-CR 2011-0193
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	(Pima County Superior
	)	Court Cause No. CR-20093952)
JEFFREY ALLEN WOOD,	)	
	)	
Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

1. Whether the trial court erroneously admitted Jeffrey Wood's statement to a correctional officer under the "public safety exception" to the *Miranda* warning requirement?

2. Whether the trial court erroneously instructed the jury by denying a *Willits* instruction, by denying instructions on self-defense, and by giving nonstandard instructions that commented on the evidence and undermined the role of counsel?

3. Whether the trial court erroneously precluded the defense from introducing evidence of the nature of Bradley Schwartz's conviction for conspiracy to commit first degree murder, even after Dr. Schwartz volunteered testimony that he finds violenece "disgusting and abhorrent"?

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STATEMENT OF THE CASE

¶1 Jeffrey Allen Wood was indicted for aggravated assault causing temporary but substantial disfigurement. Record on Appeal (ROA) 1. After a jury trial, he was convicted as charged. ROA 87; 5/11/11 Reporter's Transcript (RT) 126-28. The court sentenced Mr. Wood to a presumptive, enhanced term of ten years imprisonment. ROA 105; 6/15/11 RT 7. A notice of appeal was filed on his behalf. ROA 85. This Court has jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031 and 13-4033.

STATEMENT OF FACTS

¶2 On September 27, 2008, at the Arizona State Prison Complex in Tucson, Rincon Unit education area, twelve or thirteen inmates, including Bradley

Schwartz and Jeffrey Wood, were attending a creative writing class led by a volunteer instructor between noon and 2:00 p.m. 5/10/11 RT 117. At about 1:45 p.m., Dr. Schwartz stepped outside the class to use the restroom. *Id.* He left the restroom and approached the water fountain in the hallway outside the classroom, where he saw Mr. Wood. *Id.* at 117-18. Dr. Schwartz testified that Mr. Wood then punched him in the face and continued to hit him in the face as he fell to the ground. *Id.* at 119-20. Dr. Schwartz said to him, "alright, already, you got me enough, enough already." *Id.* at 119. Dr. Schwartz said he did nothing to provoke the attack, did not know why Mr. Wood was hitting him, and said that Mr. Wood called him a "dirty Jew" during the beating. *Id.* at 120. According to Dr. Schwartz, Mr. Wood then walked back to the classroom. *Id.* at 121. Shortly thereafter, Corrections Officer (CO) Powell saw him and called "ICS" so that officers would come assist. *Id.* at 121-22.

¶3 Dr. Schwartz, the notorious former Tucson eye surgeon convicted of conspiracy to murder his former medical partner, testified in great detail about the nature and extent of his injuries. *Id.* at 126-30. One of his injuries was a fractured orbit around his left eye, an injury he previously specialized in repairing. *Id.* at 135. Despite his expertise in this particular area of medicine, and despite being warned by the nurse at Department of Corrections (DOC) not to blow his nose because it would cause his eye to protrude, Dr. Schwartz went ahead and blew his

nose anyway. *Id*. at 139-40. Dr. Schwartz claimed he was self-diagnosing and did not cause the eye to protrude, *id*., but Nurse Quattlebaum testified that blowing his nose forced the left eye forward "almost out of the eye socket." 5/11/11 RT 24.

¶4 Dr. Schwartz's testimony was contradicted in many respects, sometimes by physical evidence, sometimes by other witnesses in the case, and yet other times by his own previous statements. He was confronted with his prior statements that were inconsistent with his trial testimony in terms of exactly where the alleged assault occurred, whether he fell "like a sack of potatoes" or "rolled" while falling down, whether Mr. Wood walked or ran back to the classroom, and how many times he was hit. 5/10/11 RT 142-48, 152-54. He was also confronted with prior inconsistent statements about whether and when he lost consciousness during or immediately after the assault; CO Sayot and Nurse Quattlebaum testified that Dr. Schwartz was lucid and conscious and very alert immediately after the attack and while being transported to and treated at two different hospitals. *Id*. at 148-51; 5/11/10 RT 22-28, 41-45. Third, Dr. Schwartz testified not only that Mr. Wood's attack on him was unprovoked but that Mr. Wood called him a "dirty Jew" during the attack; but he never gave this information to DOC Investigator Friedlander during his recorded statement given two weeks after the alleged assault. 5/10/11 RT 120; 5/11/11 RT 11-13. In fact, though he identified Mr. Wood for Friedlander two weeks later, at the time of the assault, he told CO Chiaravallo

that he did not know who assaulted him. *Id*. at 8, 82. Finally, Mr. Wood's initial, spontaneous statements to Friedlander expressed concern for Dr. Schwartz's well-being and that he did not mean to hurt Dr. Schwartz. *Id*. at 6-7.

¶5 Mr. Wood presented substantial evidence that Dr. Schwartz, a frequent target for physical beatings in prison, intentionally put himself in a position to be beaten so that he could bring a lawsuit against DOC – which was brought several months after the beating in this case. 5/10/11 RT 133. As recently as the week prior to this incident, Rayot and another CO spoke with Dr. Schwartz about going into protective custody, but Dr. Schwartz refused, saying that it was DOC's responsibility to protect him no matter what. 5/11/11 RT 46-47. Chiaravallo testified that he had gone on previous transports with Dr. Schwartz on two occasions to St. Mary's Hospital after other beatings and advised him to go into protective custody. *Id*. at 77. Mr. Wood also called Bradley Roach, an attorney who socialized with Dr. Schwartz in the past while his friend had been dating Dr. Schwartz, to testify to Dr. Schwartz's character and reputation for dishonesty and physical aggressiveness if there was a situation that could be manipulated to his personal advantage. *Id*. at 32-35. All of this evidence was used by Mr. Wood to argue to the jury that Dr. Schwartz was manipulating the system and initiated a fight with Mr. Wood in order to receive a beating that he could then use as grounds to sue DOC for a large sum of money.

ARGUMENT ONE

THE TRIAL COURT ERRONEOUSLY ADMITTED JEFFREY WOOD'S STATEMENT TO A CORRECTIONAL OFFICER UNDER THE "PUBLIC SAFETY EXCEPTION" TO THE *MIRANDA* WARNING REQUIREMENT

Material Facts

¶6 CO Fairchild was walking by the education hall of the Rincon Unit when she noticed some blood and then saw Dr. Schwartz who had been beaten. 4/28/11 RT 6-7. "He was a mess. There was blood everywhere, he wasn't able to speak to me." *Id.* Fairchild then "went down to the classroom to insure that our volunteer for creative writing was okay and safe." *Id*. Fairchild had all the inmates in the class line up against the wall for a "knuckle body check," which means the inmates take off their shirts and the officer examines the hands and bodies and clothing of the inmates to look for evidence of anyone who was involved in a fight. *Id*. at 8. Fairchild saw that Mr. Wood had blood on his pants and shoes and that his hands were shaking, so she removed him from the room and placed him in the hallway and handcuffed him. *Id*. at 9-10. Of the ten inmates in the classroom, Mr. Wood was the only one who had any blood on him or any other signs of possibly having been in a fight. *Id*. at 16-17.

¶7 Immediately after placing Mr. Wood in handcuffs, Fairchild asked him, "what's going on?" and Mr. Wood responded that "he was the only one." *Id.*

at 10. "I did ask him, come on, you couldn't be the only one, just regular C.O. talk; and he said, I was the only one, Fairchild, I did it." *Id*. Fairchild testified she asked these questions because she did not know who else may have been involved and it would be "important for purposes of officer safety to know that information." *Id*. at 14.

¶8 Fairchild did not read *Miranda*[1] warnings to Mr. Wood, because "that's not part of protocol … I'm not law enforcement … I'm a correctional officer." *Id*. at 12. In response to the trial court's examination, Fairchild responded that the prison's Criminal Investigative Unit handles investigations and her job as a corrections officer is "to secure the scene, remove any inmates who are injured, secure the assaulter." *Id*. at 15-16.

¶9 The State did not file a response to Mr. Wood's motion to suppress his statement to Fairchild, but it argued at the hearing that Fairchild elicited the statement "for the purpose of officer safety, civilian volunteer safety, inmate safety, to make a determination of what was going on there so that they could contain the situation." *Id*. at 50. Mr. Wood argued that the public safety exception to the *Miranda* warning requirement did not apply here because the situation was already contained. *Id*. at 55-57. The trial court issued an under advisement ruling denying the motion on the ground that the public safety exception applied to

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Fairchild's interrogation. ROA 75.

¶10 Mr. Wood filed a motion for rehearing and supplied interview transcripts of the other officers who were present at the scene to demonstrate that there were no remaining safety concerns at the time Fairchild interrogated Mr. Wood. ROA 78. Powell's statement to Friedlander showed that he was the first CO to respond to Dr. Schwartz and activated the emergency system, and Powell was also maintaining order in the classroom at the time Fairchild removed Mr. Wood. ROA 78, Exhibit B, p.1:28 – p.2:2, Exhibit C, p.3:23 – p.4:24. CO Duhon was also present and was ensuring the safety primarily of his fellow officers and secondarily of Dr. Schwartz. ROA 78, Exhibit A, p.3:38-41. The trial court considered these transcripts as part of the hearing evidence but denied the motion for reconsideration on the ground the additional evidence would not have affected the ruling. ROA 82.

Standard of Review

¶11 The facts presented at the suppression hearing are viewed in the light most favorable to upholding the trial court's factual findings, considering only the evidence presented at the suppression hearing, but legal conclusions are reviewed *de novo*. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008). To the extent that a motion to suppress evidence is based on exclusionary rule principles,

a claim of constitutional error is reviewed *de novo*. *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). The issue in this case is a mixed question of fact and law; deference is given to the trial court in its factual determinations, and the trial court's legal determinations are reviewed *de novo*. *Id*.; *Thompson v. Keohane*, 516 U.S. 99, 112-13, 116 S.Ct. 457, 465 (1995); *State v. Winegar*, 147 Ariz. 440, 444-45, 711 P.2d 579, 583-84 (1985).

Argument

¶12 Whether formally accused of a crime or not, all persons have the right to refuse to give self-incriminating statements to law enforcement officers. U.S. Const. amends. V & XIV; Ariz. Const. art. II, §10. "Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment." *Dickerson v. United States*, 530 U.S. 428, 433, 120 S.Ct. 2326, 2330 (2000). In *Miranda v. Arizona*, the Supreme Court held that the Fifth Amendment privilege against compelled self-incrimination applies to custodial interrogation. Because custodial interrogation is inherently coercive, the Court held that police must inform detainees of, *inter alia*, their right to remain silent. 384 U.S. 436, 467-68, 86 S.Ct. 1602, 1624-25 (1966). The Court further declared that "any statement

taken after the person invokes [the] privilege [against compelled self-incrimination] cannot be other than the product of compulsion, subtle or otherwise." *Id.* at 474, 86 S.Ct. at 1627-28.

¶13 "Voluntariness and *Miranda* are two separate inquiries. '[T]he necessity of giving *Miranda* warnings to a suspect relates not to the voluntariness of a confession but to its admissibility.'" *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983) (quoting *State v. Morse*, 127 Ariz. 25, 29, 617 P.2d 1141, 1145 (1980)). "Unless law enforcement officers advise a defendant in custody of the *Miranda* rights before questioning him, any statement made by that person in custody is inadmissible against him at trial 'even though the statement may in fact be wholly voluntary.'" *Id.* (quoting *Michigan v. Moseley*, 423 U.S. 96, 100, 96 S.Ct. 321, 325 (1975)). The Arizona Constitution, art. II, §§ 4 and 10, similarly protects a defendant's rights to due process of law and against compelled self-incrimination. In this case, the State did not contest that Mr. Wood was in custody and that the single question posed by Fairchild nonetheless constituted an interrogation. The issue presented was whether an exception to the *Miranda* requirement applied here.

¶14 In *New York v. Quarles*, 467 U.S. 649, 655, 104 S.Ct. 2626, 2631 (1984), the Supreme Court carved out a "public safety exception" to the requirement that law enforcement officers read *Miranda* warnings to suspects in

custody. The doctrine applies when police reasonably believe the public safety to be at peril from a person wielding a weapon. The Arizona Supreme Court has held that this doctrine permits the admissibility of statements made to law enforcement in circumstances where lives were in peril and the information assisted the officers in determining how to go about protecting those in danger. In *State v. Vickers*, the Court upheld admission of statements by the defendant where a fire occurred in a prison, and a prison guard's question "what happened" was met with the response "I burned Buster." 159 Ariz. 532, 535, 768 P.2d 1177, 1180 (1989). The Court determined this was not a "custodial interrogation," but even if it was, then the guards were justified by the public safety exception in asking the question because they were attempting to rescue the prisoners and the information allowed the guards to prioritize their rescue efforts on those likely to be saved. *Id*. at 538-39, 768 P.2d at 1183-84. Similarly, in *State v. Ramirez*, 187 Ariz. 116, 119-20, 123-24, 871 P.2d 237, 240-41, 244-45 (1994), the Court affirmed admission of a statement under the public safety exception when the police detained a shirtless man inside an apartment but believed a suspect wearing a red shirt and suspenders to be inside and asked questions designed not to elicit an incriminating statement but to find the other man. *See also State v. Londo*, 215 Ariz. 72, 158 P.3d 201 (App. 2006) ("rescue doctrine" permits admissibility of statements by arrestee to officer that he

ingested cocaine because arrestee was violently ill and purpose for eliciting statements was medical treatment, not incrimination).

¶15 The public safety exception in no way applies to Fairchild's custodial interrogation of Mr. Wood. As shown in the above cases, this exception applies only when the purpose in obtaining the information from the suspect is to address an ongoing emergency directly, such as locating a weapon (as in *Quarles*), locating a suspect reasonably believed to be nearby and armed and dangerous (as in *Ramirez*), or providing immediate medical care to sick or injured people (as in *Vickers* and *Londo*). In this case, on the other hand, Dr. Schwartz had already been assaulted, and Fairchild had already separated the only inmate who, upon close physical inspection, showed any sign of having been involved in the incident. Fairchild had also already maintained order in the classroom and verified the safety of the other inmates and the volunteer instructor before separating Mr. Wood and then eliciting the incriminating statement.

¶16 Both trial court rulings, ROA 75 & 82, clearly evince the court's application of an erroneous legal standard. While Fairchild may have expressed a subjective motivation to secure the area in questioning Mr. Wood, the evidence clearly showed that she and other officers had already secured the area at the time the question was asked. Fairchild's inexperience in custodial interrogations of suspects is irrelevant; as a prisoner, Mr. Wood had the right to be free from

unwarned custodial interrogations. *State v. Vickers*, 129 Ariz. 506, 511, 633 P.2d 315, 320 (1981). Though Fairchild entered the classroom with the motivation of securing the scene and ensuring the safety of the volunteer and all others, her own testimony showed that the scene was secure at the time she removed Mr. Wood from the classroom. For these reasons, the trial court erred in concluding that the public safety exception applied to the unwarned interrogation by Fairchild.

¶17 This Court must reverse and order a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 343 (2008), *quoting State v. Bible*, 175 Ariz. 549, 588 (1993). "'The inquiry … is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *Id*.

¶18 The State cannot discharge its burden in this case. Had Mr. Wood's confession been excluded, the State's proof of Mr. Wood's guilt relied very heavily on the testimony of Dr. Schwartz, who was impeached not only with two felonies (including one involving dishonesty) but also with evidence of his bad character. Furthermore, the statement obtained from Mr. Wood by Friedlander

would have had to be suppressed as well, since it was fruit of the poisonous tree. The United States Supreme Court held in *Brown v. Illinois* that

> even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint."

422 U.S. 590, 601-02, 95 S.Ct. 2254, 2261 (1975), *quoting Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 416 (1963). The Court continued: "the *Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Id*. at 603, 95 S.Ct. at 2261. Recently this Court held that an illegally obtained initial statement of a suspect was not purged when the suspect was then arrested, transported to a police station, and rewarned before giving a second statement. *State v. Kinney*, 225 Ariz. 550, ¶¶ 19-21, 241 P.3d 914, 920-21 (App. 2010). Similarly, in this case, "because [Mr. Wood] had already informed [Fairchild of his involvement in the offense], it is unlikely he later would omit the information when being questioned about the same topic at the police station." *Id*. ¶ 20, *citing Missouri v. Seibert*, 542 U.S. 600, 613, 124 S.Ct. 2601, 2610-11 (2004). For these reasons, this Court must reverse Mr. Wood's conviction and order a new trial.

ARGUMENT TWO

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY BY DENYING A *WILLITS* INSTRUCTION, BY DENYING INSTRUCTIONS ON SELF-DEFENSE, AND BY GIVING NONSTANDARD INSTRUCTIONS THAT COMMENTED ON THE EVIDENCE AND UNDERMINED THE ROLE OF COUNSEL

Material Facts

¶19 As discussed above, when Fairchild noticed that Mr. Wood had blood on his clothes and shoes, she separated him from the other inmates and brought him into the hallway. She testified that she would have had no role in removing Mr. Wood's clothing, rather that would have been done by male officers. 4/28/11 RT 11. Sergeant Arredondo was one of the first responders, and his duty was "To make sure that policy was followed. To collect evidence. To take photographs. To assist inmates in getting where they needed to go, medical or detention." *Id*. at 18-19. Arredondo retrieved a camera and took photographs of the scene, of Dr. Schwartz, and of Mr. Wood. *Id*. at 20-22; Exhibit 1.

¶20 Arredondo advised the officer escorting Mr. Wood to detention to have Mr. Wood remove his clothes and give him fresh clothes and shower shoes, and to place Mr. Wood's bloody clothes into a paper sack to maintain for evidence. *Id*. at 20-21. Arredondo realized that this evidence was important when he ordered the officer to preserve it. *Id*. at 27. CO Duhon returned with a sealed bag, which

Arredondo believed contained Mr. Wood's clothes and shoes. *Id*. at 29. It was Arredondo's understanding that the bag would be placed in an evidence locker in the criminal investigations unit. *Id*. at 31-32. Friedlander, however, got involved in the case two days later, and he had no information whether Mr. Wood's bloody clothes and shoes were ever collected or what happened to them. *Id*. at 34. Friedlander searched through the Rincon Unit evidence locker and secured areas but could not locate those items. *Id*. at 37-39. He spoke with the CO assigned by Arredondo to escort Mr. Wood to a secured area and collect his bloody clothes, but CO Contreras told Friedlander that he was never asked to collect Mr. Wood's clothing. *Id*. at 41-42. To Friedlander's knowledge, there was no evidence that Mr. Wood's clothing and shoes were ever collected. *Id*. at 45.

¶21 At the evidentiary hearing, the trial court denied Mr. Wood's motion to dismiss the indictment and motion to preclude evidence related to blood on Mr. Wood's clothing based on a finding that there was no bad faith on the part of the corrections officers in this case. *Id*. at 57. The court reserved ruling on the request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964) until the time of trial. *Id*.

¶22 After hearing this same evidence presented at trial, the court ruled that Mr. Wood's admission to committing the offense negated any possibility that the

missing evidence could tend to exonerate him, and finding no prejudice, the court denied the request for a *Willits* instruction. 5/11/11 RT 67-68.

¶23 Also during settling of jury instructions, the defense argued in favor of instructing the jury on the law of self-defense, because it had presented enough circumstantial evidence that would allow the jury to infer that Dr. Schwartz instigated the fight and that Mr. Wood was defending himself. *Id*. at 57-60. The trial court considered other possible inferences from the evidence, to which the defense responded that those inferences were also possible but, by implication, that it invaded the province of the jury to assume which inference was most reasonable. *Id*. The court denied Mr. Wood's request for instructions on self-defense, ROA 86, #4-7, finding the inferences suggested by the defense to be "pure speculation" and agreeing with the State that the defense had not presented sufficient evidence indicating that Mr. Wood had acted in self-defense. *Id*. at 60-61.

¶24 The defense also objected to a considerable number of the court's nonstandard jury instructions, requesting the RAJI instructions be given to the jury instead. *Id*. at 51-56, 61-65. In particular, the defense requested the following instructions be modified in part or replaced entirely with standard RAJI criminal instructions: #1, #2, #8, #15, and #18. *Id*.[2] The trial court denied the requested

[2] The defense also objected to court's instruction #3, which is the standard reasonable doubt instruction mandated by the Arizona Supreme Court in *State v. Portillo*, 182 Ariz. 592, 878 P.2d 970 (1995), and the trial court made a requested change to court's instruction #5. *Id.* at 53-55.

modifications or replacements, stating at one point: "I will wait for the Court of Appeals to tell me that there is something wrong with that instruction, … and they have told me that in the past as you well know." *Id*. at 52-53.[3]

Standard of Review

¶25 A trial court's denial of a proposed jury instruction is reviewed for an abuse of discretion, but whether an instruction properly states the law is reviewed *de novo*. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). "An abuse of discretion includes an error of law." *State v. Rubiano*, 214 Ariz. 184, ¶ 5, 150 P.3d 271, 272 (App. 2007). Constitutional issues are reviewed *de novo*. *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004). In construing a jury instruction, this Court must construe how reasonable jurors would have understood the instructions as a whole. *Francis v. Franklin*, 471 U.S. 307, 316, 105 S.Ct. 1965, 1972 (1985).

Argument

¶26 A criminal defendant's rights to a fair trial and due process include the

[3] This is apparently a reference to this Court's reversal of a murder conviction in *State v. Terrazas*, 2 CA-CR 2008-0207 (memorandum decision filed September 25, 2009), which will be cited in this subargument, pursuant to Rule 31.24, Ariz. R. Crim. P., for the purpose of urging this Court to publish an opinion in this case. This Court may take judicial notice of its file in the *Terrazas* case and note that Mr. Terrazas's trial lawyer was also Donald Klein, which explains the familiarity expressed between the trial judge and Mr. Wood's counsel during this exchange.

right to have the jury instructed properly on the law. U.S. Const. amends. V, VI & XIV; Ariz. Const. art. II, §§ 4 & 24. Arguments of counsel are no substitute for correct jury instructions. *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S.Ct. 1932, 1936 (1978). A fair trial includes the right to a jury instructed on any theory of the case reasonably supported by the evidence. *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983); *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). Jury instructions have three essential functions: (1) they inform the jury of applicable law in understandable terms; (2) they help the jury understand issues and matters to be proved by each party; and (3) they guide the jury to a proper verdict by relating the evidence introduced to issues under consideration. *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996).

¶27 It is the duty of the trial court to correctly instruct on the law relating to the facts and issues in the case. *State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985); *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003). This duty is independent of a request by either party. *Id.*; *State v. Price*, 123 Ariz. 197, 199, 598 P.2d 1016, 1018 (App. 1979). Failure to instruct on matters vital to proper consideration of the evidence is fundamental reversible error. *Id.*; *State v. Schad*, 142 Ariz. 619, 620, 691 P.2d 710, 711 (1984); *State v. Rea*, 145 Ariz. 298, 299-300, 701 P.2d 6, 7-8 (App. 1987).

A. The trial court erred in refusing a *Willits* instruction

¶28 *Willits* allows the jury to infer a fact against State if State destroyed, lost, or failed to preserve any evidence relating to facts in issue. *Willits*, 96 Ariz. at 187, 393 P.2d at 277. "The State cannot be permitted the advantage of its own conduct in destroying evidence which might have substantiated the defendant's claim regarding the missing evidence." *Id*. at 189, 393 P.2d at 279. "This rule is necessary to ensure that the police are neither intentionally selective or elusive, nor careless, negligent, or lazy in seizing and assuring the preservation of material evidence." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). Where potentially exculpatory evidence was lost by the State, a defendant's due process rights are protected because *Willits* "required trial judges to instruct that if they find that the State has lost, destroyed, or failed to preserve material evidence that might aid the defendant and they find the explanation for the loss inadequate, they may draw an inference that that evidence would have been unfavorable to the State." *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993).

¶29 *Willits* incorporates potentially exculpatory evidence possessed by private persons. Referring to videotape of a robbery which was destroyed by a store owner: "The State could have, and indeed should have, secured possession of the tape by request to the tape's owner or, if necessary, pursuant to a search warrant. The evidence was obviously material and the police were aware of its

existence." *Perez*, 141 Ariz. at 463, 687 P.2d at 1218; *see also State v. Hunter*, 136 Ariz. 45, 50-51, 664 P.2d 195, 200-01 (1983) (instruction required where police allowed victim's friend to move and clean a pair of scissors from the scene of the crime); *State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985) (defendant entitled to *Willits* instruction where State fails to preserve material evidence and the defendant was prejudiced); *State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987) (State has a duty to preserve evidence that is obvious, material and reasonably within its grasp).

¶30 A defendant is entitled to a *Willits* instruction if (1) the state failed to preserve accessible material evidence that might have been exculpatory, and (2) there was resulting prejudice. *State v. Lang*, 176 Ariz. 475, 484, 862 P.2d 235, 244 (App. 1993). To be entitled to a *Willits* instruction, the defendant need only show that, if evidence had not been destroyed, it *might* have tended to exonerate him. The defendant need not prove evidence destroyed by State would conclusively establish his defense. *Hunter*, 136 Ariz. at 51, 664 P.2d at 201. In some situations it may not be clear that particular evidence is, or will prove to be, material. When the State fails to assure preservation of evidence that, though not obviously material, turns out to be material, the trial court must determine if the State's failure to recognize its materiality was unreasonable. *Perez*, 141 Ariz. at 464 n.5, 687 P.2d at 1219 n.5.

¶31 A defendant must receive a *Willits* instruction when lost evidence might exonerate him; he need not show actual prejudice. "We have held that a *Willits* instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced or the state acted in bad faith." *State v. Serna*, 163 Ariz. 260, 264, 787 P.2d 1056, 1060 (1990). *See also Youngblood*, 173 Ariz. at 506-07, 844 P.2d at 1156-57 (*Willits* rule more than adequately complied with the fundamental fairness component of Arizona due process with respect to evidence which might be exculpatory when no bad faith conduct is present); *State v. Fierson*, 146 Ariz. 287, 289, 705 P.2d 1338, 1340 (App. 1985) (*Willits* instruction adequate to remedy destruction of taped interviews of witnesses who were available for examination); *State v. Hughes*, 119 Ariz. 261, 264, 580 P.2d 722, 725 (1978) (*Willits* instruction appropriate remedy when loss of evidence not due to bad faith).

¶32 In this case, there was no dispute that the State's loss of Mr. Wood's clothes and shoes was, at the very least, negligent, that the State was aware of the importance of the evidence at the time the evidence was available to be collected, and that there was no satisfactory explanation for the loss of the evidence. 5/11/11 RT 67-68. Instead, the State disputed the importance of this evidence for the defense when Mr. Wood had already admitted to committing the assault, and the trial court agreed with the State's assessment of the evidence. *Id.*

¶33 The trial court erred for two reasons. First, as shown in the previous argument, Mr. Wood's statements should not have been admitted into evidence because of the *Miranda* violation, and without that erroneous ruling, whatever evidence could have been obtained from Mr. Wood's clothing becomes the lynchpin of the case. Second, even with Mr. Wood's statements in evidence, the defense rigorously challenged the credibility of the only witness who testified about the incident: Dr. Schwartz himself. Given the evidence that was introduced at trial, the defense was able to argue to the jury that this entire incident was orchestrated by the brilliant but devious Dr. Schwartz, and that the beating that Dr. Schwartz received was less severe but for Dr. Schwartz himself worsening the injuries by blowing his nose when he, of all people, knew not to do that. 5/11/11 RT 87-103. The jury, on the other hand, was given the impression through the testimony of Arredondo and the photographs (Exhibits 1-10) that the assault was such a brutal attack that blood sprayed all over the place, including "spatter" on Mr. Wood's clothes. Without a *Willits* instruction, the jurors could not possibly understand that the law permitted them to infer that because the loss of Mr. Wood's clothing and shoes was negligent and unexplained, the evidence may have been adverse to the State and this fact alone may raise reasonable doubt about Mr. Wood's guilt.

B. The trial court erred in refusing to instruct on self-defense

¶34 The trial court must instruct the jury on the law of self-defense if there is the slightest evidence in support of the defense, viewed most favorably to the defendant; the defendant need not be motivated "solely" by self-defense. *State v. King*, 225 Ariz. 87, ¶¶ 12-13, 235 P.3d 240, 243 (2010). In *King*, the Supreme Court held that "slightest evidence" is a "low standard," and in that case, "being hit in the head by a two-liter bottle of water thrown by the victim" was sufficient to meet that standard. *Id*. ¶¶ 2, 16.

¶35 In this case, no direct evidence was produced that showed Mr. Wood acted in self-defense when he struck Dr. Schwartz. However, there was ample circumstantial evidence to permit the jury to draw this reasonable inference. First, significant areas of Dr. Schwartz's testimony contradicted the physical evidence and the testimony of the law enforcement and medical witnesses who also testified at the trial, and Dr. Schwartz also testified inconsistently with his own prior statements. Second, the evidence showed that Dr. Schwartz was motivated to get himself severely injured in order to sue DOC, and instigating a fight with someone like Mr. Wood and then getting beaten up would fuel that lawsuit and would have been consistent with his character. Third, Mr. Wood expressed concern for Dr. Schwartz's well-being when he said, "I didn't mean to hurt him," and one reasonable inference that could be drawn from this statement is that he was

responding to an attack initiated by Dr. Schwartz and did not mean to cause so much physical damage in the course of defending himself. The evidence in this case suggesting self-defense was at least as strong as that in *King*. Because Mr. Wood is entitled to instructions on his theory of the case, and the evidence supported self-defense instructions, the trial court had no lawful basis to refuse to so instruct. Accordingly, Mr. Wood's conviction must be reversed.

C. The trial court's nonstandard instructions erroneously commented on the evidence and undermined the role of counsel

¶36 As noted earlier, because this set of nonstandard instructions is frequently given, Mr. Wood asks that this Court publish an opinion in this case that addresses all of the objectionable instructions. Comparing the instructions in this case to those in the *Terrazas* case that this Court reversed two years ago, it is evident that the trial court modified its instructions on witness credibility; but because this Court did not address the other objectionable instructions in *Terrazas*, some of them have remained identical over the years.

¶37 Court's Instruction #1 stated that the jury's duty is "to determine the facts only from the evidence produced in court." ROA 83, #1. While this statement is technically correct, it is incomplete, and a more correct statement of the law would include an advisement that the jury may find facts by drawing reasonable inferences from the evidence. Because Mr. Wood's defense to the charge was

based entirely on circumstantial evidence, the trial court's erroneous instruction prejudiced Mr. Wood and inured to the benefit of the State, which presented a simple case based on direct (even if flawed) evidence from Dr. Schwartz.

¶38 Court's Instruction #15 compounded this problem because the trial court's nonstandard instruction puts undue emphasis on the high hurdle the jury must climb in order to find a fact based on circumstantial evidence. Mr. Wood asked the trial court to use the standard RAJI instruction, but that his concern with the instruction could have been addressed simply by removing the last sentence from the second paragraph: "Therefore, before you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in the light of reason, experience and common sense." ROA 83, #15. This quoted statement is also inaccurate because it *requires* the jury (by means of the word "must") to find facts proven by a particular mechanism of analysis, which is not similarly required for proof of direct evidence.

¶39 "Arizona law makes no distinction between circumstantial and direct evidence." *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993), *citing State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970). As our Supreme Court stated in *State v. Salinas*, 106 Ariz. 526, 527, 479 P.2d 411, 412 (1971), when it quoted *Harvill*: "the probative values of direct and circumstantial evidence are 'intrinsically similar' and …there was 'no logically sound reason for drawing a

distinction as to the weight to be assigned each.'" It is upon this case law that the standard RAJI instruction, requested by Mr. Wood, is based. ROA 94, #12. The third paragraph of the trial court's nonstandard instruction attempts to achieve some correctness in its statement of the law when it says that "the law *permits* you to give equal weight to both" (emphasis added), but this in no way addresses the fatally flawed second paragraph of Court's Instruction #15.

¶40 This stressing of the amount of proof needed to find a fact based on circumstantial evidence is not only legally incorrect, but by placing influence on how the jury considered the evidence, the instruction violates the prohibition on commenting on the evidence in the Arizona Constitution, art. VI, § 27. A trial court violates this provision not only when it expresses an opinion regarding what the evidence proves, but also when it "'interfere[s] with the jury's independent evaluation of th[e] evidence.'" *State v. Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d 368, 388 (2006), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶41 Furthermore, because in this case in particular, it was Mr. Wood's evidence that was circumstantial, requiring the jury to find proof of a fact by circumstantial evidence using a more onerous test unconstitutionally diluted the presumption of innocence and shifted the burden of proof in this case onto the defendant. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692 (1976)

("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."). For these reasons, Court's Instructions #1 and #15 injected fundamental error into this case.

¶42 Also, when the court informed counsel that they would be permitted to argue their positions on the law to the jury, defense counsel then pointed out that this was contradicted by Court's Instruction #2, which improperly limited the jury's consideration of the argument of defense counsel. The tone of Court's Instruction #2 casted doubt on statements of the attorneys. The court instructed the jury that: nothing said by the lawyer is evidence; the verdict should not be based on the lawyers statements, but evidence; what the lawyers say is not binding; their memory of the evidence controls over the lawyers statements and the instructions of the court control on the law. ROA 83, #2. Mr. Wood's proffered instruction, taken from the standard RAJI instruction, left out the negative tone of the court's instruction by simply informing the jury: "In their opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence." ROA 86, #1 (RAJI Criminal Standard No. 2: Lawyers comments not evidence). The trial court's instruction undermined the role of defense counsel in

discussing the evidence and arguing all reasonable inferences from the evidence that favor acquittal. *See State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989), *citing State v. McDaniel*, 136 Ariz. 188, 197, 665 P.2d 70, 79 (1983) (counsel given wide latitude in arguing inferences from evidence). This improper instruction also requires reversal.

D. Any error was not harmless and/or was fundamental

¶43 The record in this case clearly shows that the trial court understood the bases for Mr. Wood's objections, and therefore harmless error review is appropriate. *Chapman*; *Anthony*. However, if this Court believes that any objection was not preserved, then Mr. Wood submits that fundamental, prejudicial error resulted from the erroneous jury instructions. *State v. Henderson*, 210 Ariz. 561, 115 P.3d 601 (2005). In the case of the denial of the *Willits* instruction and the instructions on self-defense, Mr. Wood was denied the opportunity to present his theory of the case to the jury through the Court's Instructions, which amounts to error that is clear, egregious, and goes to the foundation of the case. Fundamental error also results when the trial court interferes with the manner in which the jury evaluates the evidence, as shown in the nonstandard instructions given by the trial court. Absent any of these instructional errors, the result of this case may have been different. For these reasons, Mr. Wood's conviction must be reversed.

ARGUMENT THREE

THE TRIAL COURT ERRONEOUSLY PRECLUDED THE DEFENSE FROM INTRODUCING EVIDENCE OF THE NATURE OF BRADLEY SCHWARTZ'S CONVICTION FOR CONSPIRACY TO COMMIT FIRST DEGREE MURDER, EVEN AFTER DR. SCHWARTZ VOLUNTEERED TESTIMONY THAT HE FINDS VIOLENCE "DISGUSTING" AND "ABHORRENT"

Material Facts

¶44 The State filed an untimely motion *in limine* to preclude the defense from introducing evidence of the nature of Dr. Schwartz's conviction for conspiracy to commit first degree murder. 5/10/11 RT 3-4. The trial court granted the motion to preclude the nature of his felony conviction, but gave counsel "free reign to probe around that during voir dire" because jurors would probably know about Dr. Schwartz's case. *Id*. at 8-9.

¶45 During the State's direct examination of Dr. Schwartz, the following exchange occurred:

> Q: Did you ever raise your hand or try to strike [Mr. Wood]?
> A. No.
> Q: Did you ever fight back yourself?
> A. No.
> Q: Why not?
> A: Well, I guess two reasons. One is the easy one and one is the difficult one. The easy one is that frankly I find violence disgusting. I find it abhorrent. Being a physician I have taken care of many people with the same problem I have had, as a matter of fact I was the contract physician for DOC for about four years. For over four years that I was in Tucson I had the contract to repair these kinds of injuries

> for everybody south of Florence in DOC, both for the inmates and for the guards.

Id. at 135-36. When the State finished its examination, counsel approached the bench and, "Based on Mr. Diebolt's question of Mr. Schwartz and his answer that he abhors violence, I would ask to be allowed to impeach him as to the nature of his prior conviction." *Id*. at 138. The trial court denied the request on the ground that it was a "collateral matter." *Id*.

Standard of Review

¶46 Evidentiary rulings are reviewed for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004). An abuse of discretion includes an error of law. *Rubiano*. This Court conducts a *de novo* review of violations of the Confrontation Clause. *State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003), *citing Lilly v. Virginia*, 527 U.S. 116, 136-37, 119 S.Ct. 1887, 1900 (1999).

Argument

¶47 The Confrontation Clause demands that witnesses against an accused be brought to testify in open court and be subject to cross-examination by the defense. U.S. Const. amends. VI & XIV; Ariz. Const. art. II, § 24; A.R.S. § 13-114(3); *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); *State v.*

Huerstel, 206 Ariz. 93, ¶ 29, 75 P.3d 698, 707 (2003). "[O]ne of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541 (1969). The right is fundamental to an ordered sense of liberty, and therefore the Sixth Amendment right to confrontation is extended to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965). The right to confrontation provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 18-19, 106 S.Ct. 292, 294 (1985). "[T]rial court restrictions on the scope of cross-examination … may 'effectively … emasculate the right of cross-examination itself.'" *Id*. at 19, 106 S.Ct. at 294, *quoting Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748 (1968).

¶48 The United States Supreme Court has repeatedly held that "a primary interest secured by [the confrontation clause] is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110 (1974), *quoting Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076 (1965). Quoting Wigmore, the *Davis* Court continued:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-

> examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

Id. at 315-16, 94 S.Ct. at 1110, *quoting* 5 J. Wigmore, *Evidence* § 1395, p.123 (3d ed. 1940). While recognizing "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e. discredit, the witness." *Id*.

¶49 In this case, Dr. Schwartz's character for physical aggressiveness was already deemed admissible, and Bradley Roach, an attorney who had socialized with Dr. Schwartz in the past, testified generally to Dr. Schwartz's character. 5/11/11 RT 31-39. Mr. Wood argued for the admissibility of the nature of Dr. Schwartz's conviction for conspiracy to commit first degree murder at the beginning of the trial because the rules of evidence allow proof of specific instances of conduct consistent with a character trait that is being offered into evidence. Rules 404(a)(2) & 405(b), Ariz. R. Evid. But once Dr. Schwartz opened the door during direct examination to his claimed character for peacefulness because he finds violence "disgusting" and "abhorrent," it should have been open season for the defense to bring in any and all specific instances of conduct that rebutted this claim.

¶50 The only rule of evidence permitting exclusion of this evidence is

Rule 403, and exclusion must be on the ground that "the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the issues…" By claiming that he "abhors violence," Dr. Schwartz injected the fact of his conviction for conspiracy to murder another person into the central issue of the case: whether Dr. Schwartz set up this entire violent episode for the purpose of obtaining injuries that would allow him to sue DOC. Far from being "collateral," as the trial court stated, the fact of Dr. Schwartz's conviction for conspiracy to commit first degree murder was a ripe area for cross-examination. Preclusion of a single question probing the nature of Dr. Schwartz's conviction ultimately led to the unconstitutional denial of Mr. Wood's right to cross-examine his accuser. *State v. McDaniel*, 127 Ariz. 13, 15, 617 P.2d 1129, 1131 (1980); *see also State v. McElyea*, 130 Ariz. 185, 187, 635 P.2d 170, 172 (1981), *quoting State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977) ("The test (for denial of the right to cross-examination) is whether the defendant has been denied the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness.").

¶51 As stated in the previous arguments, the State cannot discharge its burden of proving the error was harmless beyond a reasonable doubt. *Chapman*; *Anthony*. Other than Bradley Roach's testimony that Dr. Schwartz could be physically aggressive, the jury heard nothing that would suggest that Dr. Schwartz

would instigate an act of violence. Given the importance of Dr. Schwartz's credibility in this case, the jury may have realized that he was capable of an act of violence had it been aware of the nature of his conviction. For this reason as well, Mr. Wood's conviction must be reversed.

CONCLUSION

¶52 For these reasons, Jeffrey Wood requests this Court to reverse his conviction and remand for a new trial.

DATED: (electronically filed) September 2, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13(b)(2), Arizona Rules of Criminal Procedure, undersigned counsel hereby certifies that this Opening Brief complies with Rule 31.13(b) as follows:

1. The brief is proportionately spaced, and uses 14 point Times New Roman typeface, in compliance with Rule 31.13(b)(1);

2. The brief contains 8,293 words, and has an average of no more than 280 words per page, including footnotes and quotations, in compliance with Rule 31.13(b)(2);

3. The brief is double spaced, with top and bottom margins of at least one inch and side margins of at least one inch, in compliance with Rule 31.13(b)(1).

DATED: (electronically filed) September 2, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Opening Brief, electronically filed with the Court, will be mailed on September 2, 2011 to:

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and that one copy of Appellant's Opening Brief, electronically filed with the Court, will be mailed on September 2, 2011 to:

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DATED this 2d day of September, 2011.

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